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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-375

SHELL CHEMICAL COMPANY, a Division of Shell Oil Co.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD and TEAMSTERS LOCAL 676, etc., *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT, TEAMSTERS LOCAL 676 IN OPPOSITION

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STATUTES CITED:

29 U.S.C. (National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519):	
Sec. 8(b)(4)(B)	5
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Sec. 8(b)(7)	6, 7
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To the Honorable, the Chief Justice of the United States Supreme Court and the Associate Justices of the United States Supreme Court:

Respondent, Teamsters Local 676 respectfully suggests to the Court that a Writ of Certiorari should not issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cases (Nos. 73-1399; 73-1401) on July 8, 1974.

OPINION BELOW

Respondent Teamsters Local 676 does not disagree with the statement as contained in the Petition for Certiorari.

JURISDICTION

Respondent, Teamsters Local 676 does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Respondent does not controvert the issues as framed by the Petition with the exception of question 2. It should be pointed out to the Court that the question presented in question 2 does not concern a number of employees, but rather has reference only to one terminated employee represented by Respondent Union.

STATEMENT OF THE CASE

Respondent Teamsters Local 676 does not controvert the statement of the case as prepared by petitioner.

STATEMENT OF FACTS

It is suggested that the Statement of Facts as presented by the Petitioner is substantially correct. However, the record as made in both the 10(k) proceeding held before a Hearing Officer of the National Labor Relations Board as well as the record made before the United States District Court in the injunction proceedings which was used as a basis for the National Labor Relations Board determination both reflect that the layoff of William Pollinger was caused by Petitioner Shell Chemical which cut down on the amount of work given to its maintenance contractor, Catalytic. (31a, 41a, 141a-143a). The record further reflects the same vehicle driven for a period of many years by the

terminated employee was taken back by Shell Chemical and was, in turn, given to Shell Chemical employees to drive. (141a-143a). It is suggested that there is substantial evidence in the record indicating that the reason for the layoff of the employee involved was because of the actions of Shell in utilizing its own employees to do the work formerly performed by the employee when Shell took the vehicle which the employee had driven for a period of many years while working for the Shell contractor, Catalytic, Inc. (31a, 41a, 141a-143a).

ARGUMENT

A. The Section 10(k) Proceeding

Respondent Teamsters Local 676 submits to the Court that the decision of the U. S. Court of Appeals for the Fifth Circuit was absolutely correct as to the question of reviewability of the 10(k) proceeding under the National Labor Relations Act. (29 U.S.C. § 160(k)). The United States Court of Appeals for the Fifth Circuit in passing on the reviewability question correctly noted the procedures set up under 10(k) of the Act are ones that are purely preliminary steps prior to the issuance of a complaint alleging violation of the jurisdictional dispute sections of the Act, 8(b)(4)(D), 29 U.S.C. § 158(b)(4)(D). The Court below properly noted that if the matter is resolved or dismissed in the 10(k) proceeding, the unfair labor practice charge is precluded from reaching adjudication. Hence, no complaint has ever issued in this case charging the Respondent Union with violation of 8(b)(4)(D) nor has there ever occurred any adjudication of any complaint. (App., p. 29a). Thus, the Fifth Circuit held in accordance with the National Labor Relations Board, as well as Respondent Local 676's Motion

for Dismissal, that there was in fact no "Final Order" within the meaning of 10(f) of the National Labor Relations Act. Accord: *Bricklayers* v. *NLRB,* 475 F.2d 1316 (D.C. Cir., 1973). The Court properly analogized to representation proceedings under Section 9 of the Act where the only review available is through the unfair labor practice procedure. *AFL* v. *NLRB,* 308 U.S. 401 (1940). It is suggested that not only the language of the Act itself in Sections 10(e) and 10(f), but also the extensive legislative history referred to in the decision buttress the conclusion that there never was a "Final Order" when the Board quashed the 10(k) Notice of Hearing issued by its Regional Director. (Appendix E, p. 27a). Any other decision by the Court would open the Courts of Appeal for a flood of actions by litigants seeking to shortcut the normal review procedure for Board actions only after a complaint has issued and been adjudicated. This case never progressed as far as the issuance of a complaint. What the employer, in effect, is espousing would result in court review of 10(k) determinations by the Board before the complaint stage was ever reached, which review is neither warranted in terms of the statute or its legislative history. The Petitioner Employer in this case would have this Court believe that if this kind of Labor Board action is not reviewed, then it is without remedy to stop the type of picketing which occurred here. The Petitioner employer made the same appeal to the United States Court of Appeals for the Fifth Circuit. That Court in Footnote 14a of its Opinion (Appendix E, pages 31a, 32a) adroitly noted:

> Lest it appear that the failure to allow review of this action by the Board deprives the employer of some right to protect itself against this kind

of picketing we think it appropriate to make the following comment. Upon the assumption that the Board was correct in dismissing the section 10(k) proceeding on the ground that the dispute or the conduct of the Teamsters relative to Shell and its employees was not a "jurisdictional" dispute, it makes no difference to Shell that the action of the Board is not reviewable. Because if upon review we still have the view that the Board was correct in its determination that this was not a jurisdictional dispute, the Act does not afford any remedy to the picketed employer. In other words, it is only if either the Board in a section 10(k) proceeding or the court on review, assuming we reviewed it, determined that this dispute was jurisdictional, assigns the work to OCAW, and the Teamsters continue to picket, that Shell would have relief through a section 8(b)(4) action.

Shell urges the damage accomplished by the alleged unfair picketing as demanding relief. The Supreme Court in Garner v. Teamsters Union, 346 U.S. 485 (74 S.Ct. 161, 98 L.Ed. 228) (1953), however, has pointed out:

> "The detailed prescription of a procedure for restraint of specified types of picketing would seem to imply that other picketing is to be free of other methods and sources of restraint. For the policy of the national Labor Management Relations Act is not to condemn all picketing but only that ascertained by its prescribed processes to fall within its prohibitions. Otherwise, it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." Id. at 499-500.

Shell still had alternate causes of action under the Act for any illegal picketing. In fact, Shell filed other charges under section 8(b)(4)(B), secondary boycott, and section 8(b)(7)(C), recog-

nitional picketing, and has sought damages in a suit in New Jersey under section 303, 29 U.S.C.A. § 187. While the other unfair labor practice charges have had no success, the damage suit is still viable. It withstood a motion for summary judgment; the court finding that the section 10(k) proceeding did not "possess any attributes of finality," therefore, lacking any res judicata effect. Some small scope has also been left by the Norris-LaGuardia Act, 29 U.S.C.A. § 107, for the issuance of injunctions by federal courts. Finally, to the extent that the picketing is not forbidden or protected by the Act but is prohibited by state law, Shell is free to pursue its remedies in the state court. Cf. Garner v. Teamsters Union, *supra,* 346 U. S. at 488; Algoma Plywood Co. v. Wisconsin Board, 336 U. S. 301, 313, 69 S. Ct. 584, 93 L. Ed. 691 (1949); Hill v. Florida ex rel. Watson, 325 U. S. 538, 539, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945); Allen-Bradley Local v. Wisconsin Board, 315 U. S. 740, 748-751, 62 S. Ct. 820, 86 L. Ed. 1154 (1942).

It is therefore respectfully suggested to this Court that the Court of Appeals properly examined the legislative history of the statute relative to reviewability, properly gave effect to the language contained in Sections 10(e) and 10(f) of the Act, properly examined the policy reasons for denying review prior to issuance of a complaint and adjudication thereon, and properly concluded that the Petition for Review should have been dismissed.

B. The Section 8(b)(7) Violation

The Petitioner-Employer in this case simply requests this Court to grant certiorari to afford "the Court an opportunity to examine the validity of the Fanelli Ford doctrine and to determine whether it is a proper ap-

plication of Section 8(b)(7) of the Act or an administratively created loophole not within the contemplation of Congress" (Petition for Certiorari, page 24). It is suggested that under Rule 19, the rationale allowed for review by this Court requires that the questions presented be "special and important". Essentially, the Petitioner seeks the assistance of this Court to act as a further reviewer of fact as to whether a recognitional object existed in Respondent Local 676's picketing of this employer. It is suggested that there has been no compliance by the employer with Rule 19 which requires that the questions presented be "special and important." This Court should not permit itself to be used as a vehicle for litigants seeking further review of essentially what were findings of fact made by the Board adverse to it and affirmed by the United States Court of Appeals under the "substantial evidence" rule. Called to this Court's attention are the comments of the United States Court of Appeals on the last page of its Decision:

> The object of picketing in a Section 8(b)(7) complaint is primarily fact determination. Therefore, all elements of proof relevant to the issue are important.
>
> The standard of review requires that the Board's dismissal of a Complaint be supported by substantial evidence in the record. 29 U.S.C.A. § 160(f). Considering the findings concerning the actions the union did and did not take on which the Board based its dismissal, we conclude there was substantial evidence in the record to indicate that the object of the picketing was reinstatement. (Appendix E, page 38a)

It is respectfully suggested to this Court that the Court below correctly affirmed the factual findings of

the Board that the picketing to obtain reinstatement of the one employee involved in this case was not unlawful. This Court cannot and should not act to grant review of what is essentially a factual disagreement of the Petitioner with the Board. For all of these reasons, it is respectfully suggested that the Petition for Review on the 8(b)(7)(c) question should therefore be denied.

CONCLUSION

The Petition for Certiorari seeking review of the National Labor Relations Board Order quashing the 10(k) notice of hearing should be denied. The further question presented on the lack of any 8(b)(7)(c) violation of the Act by the Respondent Union also lacks merit. It is therefore respectfully submitted that the Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

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